CHESAPEAKE & O. RY. CO. *v.* SAUNDERS' ADM'R.

Nov. 12, 1914.

[83 S. E. 374.]

1. Railroads (§ 390*)—Injuries to Licensees—Concurring Negligence.—Where a young man, in full possession of his faculties, stepped onto a railroad track at a place where there was a public pathway, without looking to see if a train was approaching, walked down the track without looking behind him, and was struck and killed by a train which had been in plain sight for a considerable distance, but whose crew were negligent in not discovering the danger, there was mutual and concurring negligence, continuing up to the moment of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. § 390.*]

2. Railroads (§ 401*)—Injuries to Licensees—Instructions—Contributory Negligence.—In an action for the death of a licensee, killed upon a railroad track, where there is evidence to support the railroad's defense of contributory negligence, an instruction directing a verdict upon a finding of negligence by the railroad, without refring to contributory negligence, is erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

3. Railroads (§ 358*)—Injuries to Licensees—Liability—Contributory Negligence.—A railroad is not liable for negligence in failing to discover the presence of a licensee upon its tracks, or in not taking precautions to avoid striking him, where the licensee was a grown man, and was himself negligent in not looking for the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.*]

4. Railroads (§ 401*)—Injuries to Persons on Track—Requested Instructions—Contributory Negligence.—In an action for the killing of a licensee on a railroad track, charges requested by the railroad that the track was itself a warning of danger, and that the failure of a person to listen and look in both directions before going upon the track was negligence, were correct, and should have been given, if supported by the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. § 401.*]

5. Railroads (§ 369*)—Injuries to Persons on Track—Duty to Licensee.—A railroad company owes no duty to a mere licensee to keep a lookout on the front car of its train, to run its train at a slow speed, or to blow the whistle or ring the bell.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. § 369.*]

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Error to Corporation Court of Staunton.

Action by the administrator of Roddy Saunders against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. M. Perry, of Staunton, for plaintiff in error.

Carter Braxton and *Timberlake & Nelson,* all of Staunton, for defendant in error.

HARRISON, J. This action was brought by the administrator of Roddy Saunders to recover of the defendant company $5,000 damages for its alleged negligent killing of his intestate. The trial resulted in a verdict and judgment in favor of the plaintiff for $1,357.14, which we are asked to review and reverse.

[1] The salient facts of the case are few and very clearly established. On the 16th of February last, in the daytime, the deceased, an active, strong youth 18 years of age, in company with his younger brother, who was 16 years old, had been picking up coal along the track of the defendant east of the Staunton station and were returning, walking on the company's main line within the eastern limits of the city. From the point where they took the track they had walked west about 450 feet when a train coming from the east ran up behind them. The younger brother heard the train and stepped out of the way, while the deceased, who was some 8 feet in advance of his brother, appeared to be oblivious of his danger, and failed to leave the track in time to save himself, and was killed. The fact is established that the deceased did not look or listen for the approach of a train when he got upon the track, nor did he once turn his head and look to the east, to see if a train was coming, during the time he was walking to the point where he was struck. The track from the point of the accident east, the direction from which the train came, is practically straight, and the view unobstructed, for a distance of more than 800 feet, so that, if the duty of looking and listening had been observed, the deceased could have easily heard and seen the approaching train.

The deceased bore the relation of licensee to the railroad company; the track where he was killed being much used by the public as a walkway. Viewing the case from the standpoint of a demurrer to the evidence, as required, it must be assumed that the employees of the defendant were guilty of negligence in failing to exercise reasonable care to discover the presence of the deceased on the track. There was, however, nothing in the circumstances attending the situation to bring to the knowledge of those in charge of the train any notice that the deceased was paying no heed to his danger and would take no step to secure his own safety. These facts present a plain case of mutual and con-

curring negligence, containing up to the moment of the accident. The duty was equal and each was equally guilty of its breach. Southern Ry. Co. *v.* Bailey, 110 Va. 833, 67 S. E. 365.

Over the objection of the defendant, the two following instructions were given for the plaintiff:

(1) "The court instructs the jury that if they believe, from the evidence, that the place at which the accident complained of occurred had been in daily use as a walkway for a long time by a large number of persons in that vicinity, and that its use was well known to the defendant, it was then the duty of the defendant company to keep a reasonable lookout for persons upon its tracks at that place, and for its failure to do so it is liable in damages in this case, if the jury believe, from the evidence, that such failure was the proximate cause of the death of the plaintiff's intestate."

(2) "The court instructs the jury that if they believe, from the evidence, that the place at which the accident complained of occurred had been in daily use as a walkway for a long time by a large number of persons in that vicinity, and that its use was well known to the defendant, it was then the duty of the defendant company to use reasonable care to discover Roddy Saunders, if on the track on which the train was proceeding and in danger at the place mentioned, and that if the said defendant did not use such care, and that by its failure so to do the said accident occurred, then they must find for the plaintiff, even though the said plaintiff was guilty of contributory negligence: Provided they believe from the evidence that the servants of the said defendant in charge of its engine did not do all they could consistently with their own safety to avoid the injury after the said danger to the said Roddy Saunders was known, or might have been discovered by the said servants of the defendant, by the exercise of ordinary care in keeping a lookout for persons at the point where the accident occurred."

[2] The first of these instructions tells the jury that the defendant is liable under certain circumstances constituting the plaintiff's case, but wholly fails to mention the defendant's theory of the case—that the plaintiff's intestate was guilty of such contributory negligence as to preclude a recovery. The instruction should have concluded with the usual proviso, "unless they believe that the plaintiff's intestate was guilty of contributory negligence."

This court has repeatedly sustained the objection taken to this instruction, and held that where the contributory negligence of the plaintiff is relied on as a defense to an action of tort, and the evidence tends to support that view of the case, it is error to instruct the jury to find for the plaintiff, if they believe that the defendant was negligent, ignoring entirely the contributory negligence of the plaintiff. An instruction, especially one di-

recting a verdict for the plaintiff or the defendant, which is based upon a partial view of the evidence, is erroneous, and should not be given. N. & W. Ry. Co. *v.* Mann, 99 Va. 180, 37 S. E. 849; Richmond P., etc., R. Co. *v.* Steger, 101 Va. 319, 43 S. E. 612; Atl. Coast Line R. *v.* Caples, 110 Va. 514, 66 S. E. 855; Virginian Ry. Co. *v.* Bell, 115 Va. 429, 79 S. E. 396.

[3] The second instruction, regardless of the duty of the plaintiff's intestate to keep a constant lookout for his own safety, informs the jury that they must find for the plaintiff, "even though the said plaintiff was guilty of contributory negligence," provided, only, that they believe, first, that the defendant might have discovered the plaintiff's intestate by the exercise of ordinary care; and, second, might have avoided injuring him thereafter. In other words, this instruction declares the defendant liable for default in its duty to use reasonable care to discover and not to injure the deceased, notwithstanding the contributory negligence of the deceased in failing to keep a constant lookout for his own safety. In the light of the settled doctrine upon the subject in this jurisdiction, it is sufficient to say that the proposition announced by this instruction cannot be sustained. Southern Ry. Co. *v.* Bailey, supra, and the cases there cited.

The plaintiff, to support the instruction under consideration, cites the case of N. & W. Ry. Co. *v.* Carr, 106 Va. 508, 56 S. E. 276, and the case of Southern Ry. Co. *v.* Wiley, 112 Va. 183, 70 S. E. 510. In each of these cases the party complaining was an infant of tender years, to whom, under the circumstances, contributory negligence could not be imputed. They have no application to the case of a strong, active young man, fully capable of protecting himself.

Four of the instructions asked for by the defendant company and refused were as follows:

(1a) "The court instructs the jury that the defendant railroad company's track in itself was a proclamation of danger, and the law required Roddy Saunders to keep a constant lookout for approaching trains, coming from either direction. Any failure to do so on his part was negligence."

(2a) "The court instructs the jury that it was not the duty of the defendant company, so far as Roddy Saunders was concerned, to station a lookout on its front car, or to make any previous preparation for him."

(3a) "The court instructs the jury that the defendant railway company did not owe Roddy Saunders the duty of running its trains in any particular manner or at any particular rate of speed; and it was under no obligation to keep a lookout on its car, or to ring its bell, or to blow its whistle; and no recovery can be had by the plaintiff in this case, based upon the defendant's failure to do any or all of these things."

(4a) "The court instructs the jury that the track of a railway company is of itself a proclamation of danger to a person going upon it, and that he must not only use his eyes and ears, looking and listening in both directions, but he must keep a constant lookout in each direction for approaching trains. If such looking and listening does or would warn him of the near approach of a train, then it is his duty to keep off the track until the train is past, and to be on the track under such circumstances is negligence, and he cannot recover. And if the jury believe, from the evidence, that Roddy Saunders did not keep a constant lookout in each direction for approaching trains, and if they further believe that by such lookout he could have seen the approaching train in time to have stepped off the track, then the jury should find for the defendant, even though they may believe from the evidence that the defendant also was negligent."

[4] These instructions announce no new principle of law and should have been given. They are based upon the evidence, and correctly propound the defendant's theory of the case, without prejudice to the rights of the plaintiff. Instruction 1a states a familiar principle in declaring that the law required Roddy Saunders to keep a constant lookout for trains coming from either direction, and that any failure on his part to do so was negligence. The duties owing by licenses upon railroad tracks have been discussed in numerous cases, and the language used is almost identical with that used in this instruction. B. & O. R. Co. *v.* Sherman, 30 Grat. (71 Va.) 602; N. & W. R. Co. *v.* Wilson, 90 Va. 263, 18 S. E. 35; Southern Ry. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548; C. & O. Ry. Co. *v.* Rodgers, 100 Va. 324, 41 S. E. 732; Southern Ry. Co. *v.* Bailey, supra.

[5] The statement of instruction 2a, that it was not the duty of the defendant company, so far as Roddy Saunders was concerned, to have a lookout on its front car, or to make any previous preparation for him, is supported by abundant authority. A bare licensee is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there. N. & W. Ry. Co. *v.* Stegall, 105 Va. 538, 54 S. E. 19, and the authorities there cited. The case last cited is also ample authority in support of the propositions announced by instruction 3a. See, also, Williamson *v.* Southern Ry. Co., 104 Va. 146, 51 S. E. 195, 70 L. R. A. 1007, 113 Am. St. Rep. 1032.

Instruction 4a is an amplification of instruction 1a, and the authorities cited in support of the latter show that the former is free from objection

Without prolonging this opinion with further detail, it is sufficient to say that the two instructions asked for by the defendant, which were modified, should have been given in the

form in which they were asked. As written, they were supported by abundant authority, much of which has been already cited, and were based upon the evidence in the case.

The judgment must be reversed, the verdict set aside, and the case remanded for a new trial, not in conflict with this opinion.

Reversed.

KEITH, P., absent.

CARTER v. HOOK.

Nov. 12, 1914.

[83 S. E. 386.]

1. Vendor and Purchaser (§ 22*)—Option Contract—Validity—Description.—An option contract to convey certain land described it as all those certain lands owned by the vendor and lying east of the center of a certain road extending from the main road leading from the "Rich Patch mines to Hays Gap" to the lands then owned by the vendee, "which were recently purchased by him from H.'s executor and east of the line running due north from the center of the road at a point that the same intersects with said main road, including all appurtenances situated thereon, consisting, in part, of the Rich Patch Post Office Building, one residence and stable, containing, it is estimated, about 300 acres, more or less." Held, that such description was not so indefinite as to render the contract unenforceable, a competent surveyor having testified that with the option as his sole guide he had gone on the land and had no difficulty in locating it, and that any person of reasonable intelligence whether a surveyor or not, would have no difficulty in definitely locating all the boundaries.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. § 22.*]

2. Contracts (§ 10*)—Mutuality—Accepted Option.—An option contract to convey real estate after acceptance is not objectionable for want of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. Contracts (§ 59*) — Options—Acceptance—Consideration.—An option to convey land, though unsupported by a consideration, if accepted before it expires or is withdrawn, is an enforceable contract to convey, and is not objectionable for want of consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 348; Dec. Dig. § 59.*]

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.